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**Proposed Interim Enforcement Policy for
Pilot Program on the Use of Alternative Dispute
Resolution in the Enforcement
Program Request for Comments
(69FR21166)**

May 20, 2004

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DOCKETED
USNRC

May 20, 2004 (1:24PM)

The Honorable Annette L. Vietti-Cook
Secretary
ATTN: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: **Comments On Pilot Program On The Use Of Alternative Dispute
Resolution In The Enforcement Program (69 Fed. Reg. 21166)**

Dear Ms. Vietti-Cook:

On behalf of the Nuclear Regulatory Services Group (NRSG), we submit the following comments in response to the Nuclear Regulatory Commission's request for comments on its pilot program on the use of Alternative Dispute Resolution (ADR) in the enforcement program.¹ The NRSG supports the use of ADR in cases of alleged discrimination and other enforcement matters involving alleged wrongdoing. ADR can be an efficient and effective approach to resolving employment disputes and other disagreements without the need for NRC investigation and enforcement.

We offer the specific comments below in the interest of enhancing the pilot program as the NRC moves forward.

1. Early ADR Can Provide Substantial Benefits

Under the pilot program, the NRC would encourage the use of ADR between a licensee (or a contractor) and an employee who has alleged discrimination prior to an NRC investigation by the Office of Investigations (OI). ADR at this pre-investigation stage is termed "Early ADR." If the Region's Allegation Review Board (ARB) determines that a discrimination allegation meets the *prima facie* threshold, the ARB will normally recommend that the parties be offered an opportunity to use Early ADR.

¹ The NRSG is a consortium of power reactor licensees represented by the law firm of Ballard Spahr Andrews & Ingersoll, LLP.

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As the NRC is well aware, issues arising in whistleblower discrimination cases can often linger for years under the current system. ADR can help resolve these issues much quicker and in a mutually agreeable manner, especially if applied early in the process. Experience shows that employment discrimination matters are often well suited for resolution through the open dialogue of ADR because many of these disputes arise from workplace misunderstandings or miscommunications. Further, allowing Early ADR to resolve such cases can have a positive effect on a site's Safety Conscious Work Environment (SCWE) by fostering a prompt and amicable resolution that helps avoid any chilling effect on the workforce. For these reasons, the NRSB supports the NRC's Early ADR process.

The NRC notes that it would normally expect a settlement to be reached and signed within 90 days from when the parties agree to attempt ADR. The NRC should recognize, however, that in some cases it may be appropriate to build in a "cooling off" period. Employees who feel they have been wronged by their management are often quite passionate about the issues in dispute. Trying to mediate/facilitate a settlement when emotions still run high may not be fruitful. In these situations, the NRC's program and schedule should allow flexibility for a cooling off period prior to attempting to resolve the dispute through ADR.

We also support the NRC's proposal to allow use of ADR to resolve alleged wrongdoing or discrimination matters following an OI investigation. Under the pilot program, the NRC would allow the use of ADR at the post-investigation stage in cases where an NRC enforcement panel concludes that pursuit of an enforcement action appears warranted. The use of ADR at this stage can help resolve matters more expeditiously and facilitate the implementation of corrective actions without the need to expend licensee and agency resources on a predecisional enforcement conference or further proceedings.

2. The Process Must Provide Certainty That No Investigation Will Be Conducted After An ADR Settlement Or Resolution Is Achieved

A significant disincentive to using ADR would exist if the NRC could initiate an investigation and enforcement action even after the parties have reached a settlement or other resolution through ADR. The parties would be reluctant to expend the time and resources to engage in ADR if they believed that the case could revert back to the NRC and be handled through a full-scale investigation and enforcement process.

In recognition of this concern, the NRC indicates that it will review settlement agreements between the parties only to ensure that they contain no "restrictive agreements" limiting an employee's ability to report safety concerns to the NRC in violation of 10 C.F.R. 50.7(f). Assuming no such restrictive provisions exists, the NRC states that it "will not investigate or take enforcement action." 69 Fed. Reg. at 21170.

The same certainty would be provided for cases resolved through a licensee-sponsored ADR program (see 69 Fed. Reg. at 21167).

We support the position that no investigation should occur in any case where a settlement or resolution has been reached through ADR. It is essential that the NRC program provide the utmost certainty and predictability on this point. The NRC should also clarify that no investigation or enforcement will be initiated where a settlement has been reached in principle, even if the parties are still working out the terms of the written settlement agreement.

3. The Parties Should Control The ADR Process

Under the pilot program, the selection of the neutral mediator or facilitator would be controlled by the parties. As the NRC recognizes, most stakeholders believe that the ability to select an external neutral is critical to ensuring an unbiased result and "buy-in" to the process by employees and licensees alike. Experience shows that when the parties are allowed to select a mediator of their own choosing, both sides feel more in control of the process and will be more open to a resolution of the issues. Furthermore, when the parties reach an initial agreement on an acceptable mediator, it can set an amicable tone for the remaining negotiations. For these reasons, the parties should be given maximum flexibility with respect to choosing whether or not to proceed with ADR, selecting the neutral, and determining whether to agree to be bound by the outcome.²

With respect to payment of the neutral's fees, during the pilot program, the NRC states that it will pay the mediator's entire fee if Early ADR is used. The NRC will recover the mediator fees it pays through annual fees assessed to licensees under 10 C.F.R. Part 171. While we understand the NRC's desire to relieve a burden for individual employees who may not be financially able to pay half the fees as is typically expected in ADR, this approach could result in an unrealistic assessment of the pilot program if it creates an artificial incentive for employees to seek ADR for a claim of discrimination during the pilot program period. The NRC should monitor the situation as the pilot program goes forward to make sure that the fee payment approach does not lead to abuse of the system.

² The NRC indicates that its review of settlements achieved through ADR will be focused on ensuring that there are no restrictive provisions that are contrary to 10 C.F.R. 50.7(f). Some commenters may suggest that with the wide array of possible neutrals for the ADR program, there could be conflicting determinations and settlements, so that the NRC needs to monitor settlements. As a general proposition, it would be appropriate for the NRC to try to maintain uniformity of settlements, findings and decisions reached through ADR. However, the NRC should resist any suggestion that it second-guess ADR settlements or determinations, absent a provision in a settlement that contravenes 10 C.F.R. 50.7(f).

Honorable Annette L. Vietti-Cook

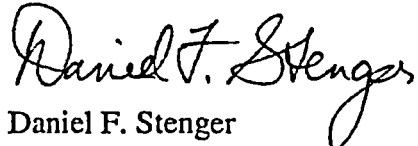
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In conclusion, we support the NRC's pilot ADR program. The pilot program is a step in the right direction in providing an approach to resolve discrimination and other matters through the open dialogue of ADR. We appreciate the opportunity to comment on this important initiative.

Very truly yours,

A handwritten signature in black ink, reading "Daniel F. Stenger". The signature is written in a cursive style with a large, looped initial "D".

Daniel F. Stenger
Counsel to Nuclear Regulatory Services
Group